CAN

THE MONOPOLY

LAWFULLY BE ABOLISHED?

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TO THE PEOPLE OF NEW JERSEY.

Burlington, April 20, 1849.

Fellow Citizens—The following paper is the first of a short series with which I have been favoured by a legal friend who feels a warm interest in the great question now pending between yourselves and the monopolists, by the decision of which it is to be determined whether you may, or may not, pass in or out of the State without the payment, at their various custom houses, of taxes whose amount is to be regulated according to their own good pleasure. They claim that the restriction upon their charges is only from Camden to Amboy, and does not extend over the water carriage between Philadelphia and Camden, or Amboy and New York, and that they may therefore charge what they please, even to the extent of a hundred dollars per ton, upon all produce or merchandise passing over the latter portions of the route. That claim will be established should the Court of Errors reverse the decision of the Supreme Court. Thenceforward, all peaches will probably pay forty cents per basket, that those of the managers may be carried free.

A careful perusal of these papers can scarcely fail to satisfy you that it has always been within the legislative power to set aside the monopoly privilege, but that even had it been otherwise, the known and acknowledged violations of the provisions of the charter had long since placed it within the reach of the Attorney-General, without the necessity for resorting either to Committees of Investigation or legislative enactments.

A Citizen of Burlington.

"CAN THE MONOPOLY LAWFULLY BE ABOLISHED?"

NO. I.

In the progress of the discussions respecting the monopoly of the Camden and Amboy Railroad Company, the question of the constitutional power of the Legislature of the State to give relief against its own acts, has now become a practical and pressing one. In securing to the States most of the attributes of sovereignty, the constitution of the federal union has imposed the restriction that this sovereignty shall never be exerted in derogation of vested rights: and this restriction has become an invaluable element of our civil liberty. If the monopoly is a "contract," in the sense of the constitution; if it is a contract which the judicial department of the Government will pronounce to be subsisting and valid; if a legislative authority to make a new railroad between New York and Philadelphia would be a "law impairing the obligation of contracts;" the community have nothing to do in the matter but to submit to the inconvenience. However prejudicial to the business, and accommodation, and comfort of the people, the administration of the monopoly may be, the first interest of all men is to maintain the constitution and the law. But before encountering the embarrassment of this conflict between public duty and public interest, it might be well to inquire whether, in point of reality, the making of a new railroad, would be a violation

of any constitutional contract; whether there is, or is not, any legal difficulty in the way of putting an end to the great mischief of the present monopoly. The official publications of the Company have repeatedly acquainted the public that the privileges which the Company exercises are defended by the unassailable sanctity of chartered right, and the inviolable obligations of the State Faith; but as the public has seen some cause to feel a little distrust of these publications in respect to matters of *fact*, it could not be thought unnatural that some doubt should arise as to the soundness of all their declarations in matter of *law*. The plain truth is, that the pretension of the monopolists, that they are constitutionally exempt from the control of the Legislature, is without any foundation in law. Put forward as the pretension has been by the literary bullies of the Company, it is only a very characteristic piece of impudence and imposture. Originating in the fiercest rapacity of selfishness, conducted upon a systematic violation of law and duty, the practices of these Railroad and Canal Companies can be defended only by fiction and effrontery.

There are three distinct points of view, under which the right of the State authorities to relieve the public from the oppression of the monopoly, may clearly and confidently be affirmed.

1. In the first place, the monopoly privilege is not a part of the charter of the Company, but is a law passed long after the franchise was granted, and not a matter of "contract," according to the legal signification of that word, as determined by the Supreme Court of the United States.

2. In the second place, the uniform practice of the Companies in charging illegal fares, especially their charge of four dollars for passage money, in violation of the plain and express injunction of law, is unquestionably ground of forfeiture of their franchises, upon proceedings in *quo warranto* in the Supreme Court of the State.

3. And lastly, admitting that the corporations, with their privileges of monopoly, are contracts, and indefeasible property, they may yet be taken for public purposes, as any other private property may be taken: and this principle has been settled by the Supreme Court of the United States, at the session before the last, in a case precisely analogous to the present one; and upon grounds of reason and authority which settle this matter beyond all further question.

Each of these particulars will be explained in successive papers: the present is confined to the first of them alone.

The monopoly privilege is no part of the charter of the Companies, and is not therefore, constitutionally, a "contract." It is merely a *law*, and as such, repealable at any moment; or, at most, it is an engagement on the part of the State, not to exercise its legislative functions on a particular subject, and, as such, is simply nugatory and void, and no legal "contract." The facts of the case will first be stated, and then the legal principles applicable to them.

By an act of the Legislature of New Jersey, passed the 4th of February, 1830, the Camden and Amboy Railroad and Transportation Company was incorporated. This act contained no provision against the incorporation of another company for a similar purpose: on the contrary, it distinctly recognizes the right of the State to incorporate any new company, and it defines the consequences of such subsequent incorporation, by declaring "That if the State of New Jersey shall authorize the construction of any other railroad for the transportation of passengers across this State, from New York to Philadelphia," beginning and terminating within three miles of the commencement, and termination, of the road then authorized, the impost of ten cents per passenger, and fifteen per ton of merchandise, should cease. By an act passed the 4th of February, 1831, it was enacted "that it shall and may be lawful for" this Company to transfer a thousand shares of stock to the State; and that the State might there-

upon appoint one director; and that when any other railroad or roads between New York and Philadelphia should be authorized and constructed, this stock should be re-transferred; and that no railroad across the State should be made within three miles of the Camden and Amboy road until after the time allowed for the completion of that road, (nine years): and that upon filing the Company's assent to this act within five days, "this act shall be deemed and taken as part of the charter of said Company." By an act passed the 15th of February, 1831, the Canal and Railroad Companies were consolidated into one. On the 2d of March, 1832, another act supplementary to the last, was passed. The first section of this act provides, "that it shall and may be lawful" for the Railroad and Canal Companies to transfer to the State one thousand shares of the joint stock. The second section enacts, "That it shall not be lawful, at any time during the said railroad charter, to construct any other railroad or railroads in this State without the consent of the said Companies, which shall be intended and used for the transportation of passengers or merchandise between the cities of New York and Philadelphia, or to compete in business with the railroad authorized by the act to which this supplement is relative." The third section declares that the Company shall always cause the State to receive $30,000 a year on account of transit duties and dividends. The seventh section enacts that the assent of a majority of the stockholders shall be submitted in writing to the Governor, and filed "within forty days after the passing of this act, or this act shall be void." And these are all the legislative provisions that are relative to the present question.

The ground upon which acts of incorporation by a State have been determined by the supreme judiciary of the union to be "contracts," and as such to be unrepealable by the Legislature of the State, in consequence of that clause of the constitution which forbids the passing of any law impairing the obligation of contracts, is perfectly clear, and definite, and satisfactory. A *grant* by a State to an individual or individuals is a "contract," in the sense of the constitution. Any law, the operation of which is to vest in any person or persons, any corporeal or incorporeal hereditament—anything which courts of justice recognize as property—is a "contract," in the sense of the constitution, and cannot be repealed. A charter, or act of incorporation, is a "contract," constitutionally, because it transfers and vests in private persons, a franchise, which is legal property. No law is unrepealable, and unalterable, except where the effect of the law was to vest or transfer property, and the effect of the repeal or alteration would be to devest or change that property. "The provision of the constitution," says Chief Justice Marshall, in the case of the Dartmouth College *v.* Woodward, "never has been understood to embrace other contracts, than those which respect property, or some object of value, and confer rights which may be asserted in a Court of Justice." A *law* therefore, never becomes a constitutional "contract," except where it creates or transfers property or a title to property—where it is in the nature of a conveyance of an *interest*, or is an authority to create or convey an interest. This is the principle established by the adjudications of the Supreme Court of the Union, and no case can be found in which a repealing law has been held unconstitutional, upon any wider ground than this.

In applying these principles, it must be admitted that the original incorporation of the Railroad Company by the act of 4th of February, 1830, supposing it to have been a private act, was constitutionally a "contract," not to be repealed or altered by the mere action of the legislature. But not so the second section of the act of second of March, 1832. That was not the grant of any franchise. It was not connected with the grant of a franchise or of other property, so as to be an inseparable part of such grant. No subscriptions were made upon the faith of that section. It is not a part of the basis upon which the members of

the company came together, and embarked their capital, and engaged in an expensive work. Legally and morally, in form and in substance, it has none of the elements of that sort of "contract," which alone, according to the decisions of the Supreme Judicature of the Nation, a State Legislature is forbidden to impair. It matters not that the effect of that section may have been to increase the value of the Company's property; it does not on that account become unrepealable. Laws are constantly passed, the effect of which is to increase the value of particular property; but such laws are as constantly repealed, without a constitutional hindrance. Unless an enactment grants property, or is connected with such grant in a way to affect the nature, condition, or circumstances of that property, it is not a "contract" in the meaning of that clause of the constitution. But, it may be said, there is a consideration for this last enactment, and therefore a new contract for a valuable equivalent, is made. It matters not. Whatever consideration an individual may pay to the State, for the obtaining of a law, that law will not be a "contract," in the sense of the constitution, unless it grant, or be connected with a grant, of property; and it may be repealed at any moment, because such repeal does not disturb any vested right of property. The most that can be said of that act of 1832, in the way of regarding it as an agreement, is, that the Legislature in consideration of a thousand shares of stock, agrees to pass a law and does pass one, prohibiting all persons from constructing roads that shall compete with the Camden and Amboy Railroad. Previously to that enactment, any private individuals or joint company might have made a road from New York to Philadelphia. It is an abundant equivalent for a thousand shares of stock, that a law is made prohibiting such construction by individuals, though the law itself, like other laws, is repealable at the pleasure of the Legislature. It is not a part of the requirement, as contained in that act, that the Legislature shall not create an incorporated company specially authorized to make such a road. It is the consequence of that act of 1832, that no one can make such a road without the authority and permission of the Legislature, or the consent of the Company: but with either, any one certainly may.

But the creatures of the Company have endeavoured to represent this act of 1832, as an agreement by the Legislature that they will not charter any corporation to make a railroad during the charter of the Camden and Amboy Railroad. In this point of view, it is a bargain on the part of the Assembly not to exercise its legislative functions upon a particular subject, for a certain time, or forever, accordingly as the charter be regarded as determinable or as indefinite. But that is not a "contract" in the constitutional sense, and there is no prohibition in the constitution against a law to abolish such a convention. On other grounds, moreover, such a bargain is clearly nugatory and void. The Legislature cannot either by laws or bargains deprive itself of its constitutional power. Such a thing is preposterous, and absurd upon its very face.

But luckily for the honour of the country, the infamy of such a design cannot be charged upon the State. The act of 1832 is not an agreement or bargain. The benefit of the second section is not granted in consideration of the profits to be realized under the first. It is not a condition of the privilege in the second section that the Company shall assign to the State a thousand shares. The Company is not required to grant a thousand shares at all. The first section provides only "That it shall and may be lawful" for the Company to assign these shares; and then the second section is an independent enactment. It is obvious, too, that the Legislature of 1832 intended not to tie their hands up in regard to the monopoly, and not to incorporate the privileges of that act of the second of March, with the Company's charter. In the act of 4th of February, 1831, above referred to, it is provided that upon the Company's assent being shown, "this act shall be deemed and taken *as part of the charter* of said Company." But

the act of second of March, 1832, provides merely that unless the Company's assent be given in a certain time, "*this act* shall be void." The latter act is not made a part of the charter. It is no "contract" constitutionally, and no agreement or bargain politically: it is a mere *law* that no one shall construct a road to compete with the Camden and Amboy road, and as such it may be repealed at any time, or may be invaded by the Legislature's chartering a company whenever they think fit.

These conclusions do not rest upon general reasoning, merely: they are established by express decisions of several courts, in cases entirely similar to the one now under consideration.

In the first place, that the grant of a railroad or canal charter never implies that the privilege is exclusive, but that the Legislature, after having incorporated one railroad or canal company, has authority immediately to incorporate another at the side of it, was settled, once and forever, by the judgment of the Supreme Court of the United States, in Charles River Bridge *v.* Warren Bridge et al., 11 Peters 420. "In charters of this description," said Chief Justice Taney, in delivering the opinion of the court, "no rights are taken from the public, or given to the corporation, beyond those which the words of the charter, by their natural and proper construction, purport to convey. There are no words which import such a contract—and none can be implied. The whole community are interested in this inquiry, and they have a right to require that the power of promoting their comfort and convenience, and of advancing the public prosperity, by providing safe, convenient, and cheap ways for the transportation of produce, and the purposes of travel, shall not be construed to have been surrendered or diminished by the State; unless it shall appear by plain words, that it was intended to be done." (pp. 549, 550). The same principle was strongly affirmed by the Court of Appeals of Virginia, in Tuckahoe Canal Co. *v.* Tuckahoe Railroad Co., 11 Leigh 42, where it was decided that the Legislature, after incorporating a canal company, might immediately incorporate a railroad company to run their road alongside of the canal, and even to cross it. "It can never be conceded," said President Tucker, in delivering judgment, "that the incorporation of one company for internal improvement, is an implied negative of all future power in the Legislature to incorporate other companies for other improvements. If these pretensions are listened to, there will soon be an end of the necessary improvement of the country. But they are without foundation. Monopoly is not a matter of inference. It must rest its pretensions upon express grant. It is a restriction upon common right, and upon legislative power, and cannot be implied."

In the next place, it has been expressly decided, that a clause in an act of incorporation, similar to that in the second section of the act of 1832, providing that no person shall construct a road or other improvement to compete with the one first authorized, does not prohibit *the Legislature* from incorporating another company, at a subsequent time, to make a road or other improvement that shall compete with the former one. This was settled in New York, by the case of The Mohawk Bridge Co. *v.* The Utica and Schenectady R. R. Co., 6 Paige 555. "The Legislature," said the Chancellor, in that case, "has indeed protected the Mohawk Bridge Company in the enjoyment of an exclusive right to carry passengers across the river at Schenectady to a certain extent, by prohibiting others from establishing a ferry within a certain distance from the toll bridge; but it has not deprived a future Legislature of the right to authorize the erection of another bridge within the prescribed limits whenever the public good shall appear to require it. * * * Grants of exclusive privileges being in derogation of public rights belonging to the State or to its citizens generally, they must be construed strictly, and with a reference to the intent and particular objects of the statute."

The case of The Oswego Falls Bridge Company *v.* Fish, 1 Barbour's Chancery 547, fully sustains the authority of this decision. The recent case of Thompson *v.* The N. York and Harlem Railroad Company, 3 Sandford 625, is directly in point with the case of the Camden and Amboy Companies. In that case, an act of the State of New York in 1790, entitled, "An act for building a bridge across Harlem River," authorized Lewis Morris and his heirs and assigns to build a bridge across the Harlem River, from Harlem to Morrisania, and to take certain tolls: and the second section of the act provided, "That it shall not be lawful for any person or persons whatsoever, to erect or cause to be erected any other bridge over or across the said Harlem River to Morrisania, or to keep any scow, flat, or other vessel, to ferry any person over or across the said Harlem River from Morrisania to Harlem, except for the private use of the inhabitants of the townships of Harlem and Morrisania." In 1840, the Legislature authorized the N. Y. and Harlem R. R. Company to construct a bridge across the Harlem River: and this was complained of as an infringement of the rights vested in the heirs and assigns of Lewis Morris. "The complainants insist," said the A. V. Chancellor in pronouncing the decree, "that (the second section of the act of 1790) is a grant and covenant on the part of the Legislature, that it will not permit any person except those inhabitants, to erect any bridge or ferry, and those could erect one for their private use only. That the grant was by its terms exclusive, and if it were not so expressed, the grant of tolls necessarily excluded all competition which would diminish the tolls; and it was not in the power of the Legislature, afterwards to make a grant which would impair the full enjoyment of the franchise conferred on the bridge, and any such grant would be void under the Constitution of the United States, as impairing the obligation of the contract made by the State with the Harlem Bridge Company. As to these positions of the claimants, the *Charles River Bridge* case, with that of the *Stourbridge Canal Company* v. *Whaley* (2 Barn. & Ad. 792), is decisive against any implication of an exclusive right, when the charter is silent on the subject; and the decisions of the Chancellor (referred to above) appear to me to be equally conclusive against any restriction of the power of the Legislature to charter a new toll bridge, or to authorize a free bridge, in competition with that allowed across the Harlem River by the act of 1790. Other cases to the same effect, will be noticed hereafter. *The act of* 1790 *does not declare that the Legislature will not permit another bridge to be erected.*"

This is conclusive of the present question.

NO. II.

Burlington, April 27, 1849.

It was shown in the last number of the Gazette, that the monopoly enactment was no part of the charter of the Railroad Company, and might therefore be repealed at pleasure; and that without repeal, the Legislature might at any time proceed to exercise the right, not only never parted with, but expressly reserved in the charter, of granting another incorporation for the purpose of constructing a road between New York and Philadelphia. It will now be demonstrated that the State, by its judiciary department, has an unquestionable right to resume the franchise of the companies, for *misuse* and breach of duty, by proceedings in *quo warranto*, or information in the nature of a *quo warranto* or *scire facias*, or such other legal remedy of that description, as, according to the practice of the courts of New Jersey, may be deemed most advisable. The legal principles on

this subject will first be stated, and then the application of them to the case in hand.

It is a fundamental maxim of incorporations, that they are granted upon an implied condition, to be always administered in conformity with the law from which they derive their existence; and upon a failure to carry out the *purposes* of their creation, or upon a departure from the *methods* appointed for the accomplishment of those purposes, the charter becomes forfeit in law, and may be resumed by the State, upon a judicial proceeding. A franchise is a portion of the public sovereignty vested in the hands of individuals. Although it is private property, it is always affected with a public trust. It is granted for the *public good*, and not for private emolument merely. If it fails to perform the public good it was instituted for, by *non use; a fortiori*, if it perverts its powers to selfish and sinister ends, by *misuse*, or *abusing*, as Lord Coke terms it; it incurs a forfeiture of its legal existence. And these principles, instead of being dealt with tenderly or squeamishly by courts of justice, have at all times been applied rigidly and thoroughly, as being great conservative doctrines, indispensable to prevent enormous mischiefs; and have been affirmed and enforced in regard to great cities, banks, railroads and turnpike companies, and every species of corporation, public and private. "All franchises," says Lord Holt, in delivering judgment in the City of London *v.* Vanacre, 12 Modern 271, "are granted on condition that they shall be duly executed according to the grant: and if they neglect to perform the terms, the patent may be repealed by *scire facias.*" "Franchises," says Chief Baron Comyn, "may be forfeited by a breach of the trust upon which they are granted, and a perversion of the end of the grant or institution." "A private corporation, created by the Legislature," says Mr. Justice Story, in pronouncing judgment in the case of Terrett and others *v.* Taylor and others, 9 Cranch 51, "may lose its franchises by a *misuse*, or a *non use* of them; and they may be resumed by the government, under a judicial judgment upon a *quo warranto* to ascertain and enforce the forfeiture. This is the common law of the land, and is a tacit condition annexed to the creation of every such corporation." These principles will be found thoroughly established and vindicated in the courts of New York, in the Turnpike Road cases and the Bridge cases, in the 23d volume of Wendell's Reports, in which the discussions are so ample and so conclusive, that it is only necessary to refer to them. In the Supreme Court of that State it has been solemnly adjudged upon reasoning and authority that admit of no question, that the neglect of a turnpike company to rebuild a bridge which had been destroyed, is a cause of forfeiture at common law; The People *v.* Hillsdale and Chatham Turnpike Co., 23 Wendell 255: that a neglect of such a company to keep the road "faced with gravel or broken stone of nine inches in depth, in such a manner as to secure a firm and even surface, rising in the middle by a gradual arch," as the act of incorporation required, is a forfeiture; The People *v.* Bristol and Rensselaerville Turnpike Co., Id. 223: and also, which is directly applicable in the present case, *that a demand and receipt of higher tolls than the law allowed*, was of itself a ground of forfeiture; The People *v.* Kingston and Middletown Turnpike road Co., Id. 194, 211. And the remedy is by *quo warranto*, or by information in the nature of *quo warranto*, to resume the franchise and terminate the existence of the corporation. See also Thompson *v.* The People, 23 Wendell 537; and The State *v.* The Real Estate Bank, 5 Pike 596.

In applying these legal principles, the only embarrassment would be to pick and choose among the numerous instances of neglect and abuse which the conduct of the companies for years exhibits. But at present only a single class of illegalities will be referred to, and only a particular case within that class. The rates of charges for transportation on the Railroad have already been decided by the Supreme Court of the State to be illegal; and that decision equally establishes

the illegality of the charges on the canal. The Court which gave that opinion would be bound to give judgment for the State or the People in a proceeding in *quo warranto*, or by information, to seize the franchise as forfeited. But without going into the details of the matter of tolls, which are somewhat complicated, we shall, in this paper, ground the liability of the corporations to forfeiture, upon one single, plain violation of the express provision of the laws of their incorporation; the four dollar charge for the conveyance of passengers from New York to Philadelphia. That charge, from the beginning, and now, has been and is, utterly illegal, and in direct violation of the acts of the Legislature of New Jersey from which the Companies derive their powers.

On the 4th of February, 1830, by two distinct acts, the Camden and Amboy Railroad Company, and the Delaware and Raritan Canal Company, were separately incorporated. By an act of 15th of February, 1831, they were consolidated into one joint Company, under certain conditions, however, one of which is in these words: "*Provided also*, That it shall not be lawful for the said Companies to charge more than three dollars, for the transportation of passengers from and to the cities of New York and Philadelphia." On the 7th of March, 1832, the New Jersey Railroad Company was incorporated to make a railroad from New York to New Brunswick: and on the 15th of March, 1837, an act was passed, authorizing "the united Delaware and Raritan Canal and Camden and Amboy Railroad and Transportation Company" to construct a railroad from New Brunswick to Trenton and thence to the line of the Amboy road at or south of Bordentown. By this latter act the Companies were invested with the same powers in regard to this road, which had been given to them by former acts; and were expressly made "*subject to all the provisions, conditions, liabilities, limitations, and restrictions, to which they are now subject under said acts.*" Of course, they became subject to the provision in the act of 15th of February, 1831, "that it shall not be lawful for the said Companies to charge more than three dollars for the transportation of passengers from and to the cities of New York and Philadelphia."

Now it is notorious, that ever since the Philadelphia and Trenton Railroad was purchased by the managers, and employed in connexion with the Trenton and New Brunswick road, the charge for the transportation of passengers to and from the cities has been, upon that route, four dollars. And what justification is offered for this apparent departure from the laws? This; that the Bristol road is not under the jurisdiction of New Jersey laws; and that the extra dollar is taken upon a road beyond its sphere. A very little consideration will show that this pretension is frivolous and absurd.

The prohibition against charging more than three dollars from city to city is *upon the Companies.* It is not upon the roads, it is *upon the corporations.* By whatever routes they may carry, the prohibition still attaches *to the Companies.* When the prohibition was first imposed, that is to say, on the 15th of February, 1831, no other road was in existence than the road from Camden to Amboy. The water communication from Amboy to New York, at that time, was not, nor ever has been, within the jurisdiction of New Jersey laws; the water communication from Camden to Philadelphia was and is without the jurisdiction of the New Jersey Legislature; but the Legislature had a right to say, and they did say, "in giving you privileges within our jurisdiction, we insert a condition as to the amount of your charge for the whole distance from city to city,"—and when the Companies accepted those privileges they thereby engaged to observe the condition upon which expressly they were given. It would have been preposterous for the Companies to pretend that they might charge four dollars or forty dollars, on the Camden and Amboy route, because a part of the communication from city to city was beyond the range of New Jersey laws. The Com-

panies at one time ran from Amboy to Bordentown and there took a steamer to Philadelphia; but it was never pretended that by so doing they acquired a right to charge more than three dollars from city to city. It is plain, that the fact that the road from Trenton to Bristol, or from Trenton to Tacony, is employed as a part of the line, cannot exempt the Companies from the operation of the clear, express, and general provision "That it shall not be lawful for the said Companies to charge more than three dollars for the transportation of passengers from and to the cities of New York and Philadelphia."

There is another matter, which, though it has no practical bearing on the subject, ought to be referred to, because it has been lyingly used to perplex this subject and to deceive the people. By an inchoate act dated March 15, 1837, the Companies were authorized "to charge the sum of four dollars for each passenger carried on any of the railroads of the said Companies, to and from the cities of New York and Philadelphia, by day, and five dollars by night: *Provided*, That they shall pay into the treasury of this State one half of any sum over three dollars they may charge each passenger carried," and by the 3d section, the former limitation of three dollars for each passenger was repealed. This inchoate act, however, never became a law. In the first section it was provided —by reference to a previous supplementary statute—that the act should not go into effect until the Companies' acceptance of it should be certified under their corporate seals, and that a copy of the certificate of acceptance should be published with the act, among the laws of the State. This was never done; and the act did not take effect as a law. Had it become operative, however, the Companies' charge of four dollars, as they have made it, would still be indefensible. This act was intended to authorize an *alternative* mode of charging; that is, it was designed to give the Company the option of substituting for the three dollar charge, a four and five dollar charge subject to the condition of dividing half the excess with the State; and if the Companies did not act under this authority, the former three dollar charge was of course to remain. No doubt, there was a fraudulent device in the framing of that act; but this is unquestionably the judicial construction of the act, had it ever come into force. The Company never did divide the excess with the State; in other words, they never acted under this supplementary bill; and of course remained subject to the old three dollar limitation. It is enough to observe, however, that this is not, and never was, a *law*.

In declaring the four dollar charge to be illegal, and always to have been so, we do not put forth a speculative suggestion—a mere opinion. We affirm the illegality of those charges, as a plain, obvious, undeniable principle of law, about which there is no possibility of a division of opinion. No lawyer—not even the bought and sold creatures of the corporations—will dare to give a legal opinion in favour of the legality of those charges. The position could not be maintained for a moment.

It may be observed, in conclusion, that among the delusions and falsehoods which have been propagated on the subject of the rights and privileges of the Companies, is the statement that the law imposing a penalty of a hundred dollars for every case of over-charge, operates as a remission of the forfeiture which would otherwise be incurred. The statement is wholly groundless and absurd. The right of forfeiture is merely the enforcement of the fundamental condition upon which the charter was granted, that the provisions of the charter should be faithfully observed: the additional penalty subsequently imposed, can discharge that forfeiture only by making it lawful and rightful to charge more than the appointed rates: and the imposing of that penalty, so far from legalizing excessive charges, assumes that they are unlawful, and punishes them as offences. The imposing of such a penalty would have made that unlawful, which under the

charter might have been lawful: acting upon what before was forbidden, it doubly settles the illegality of the charges. A penal amercement can never make that right which it punishes as wrong. To suppose that that hundred dollar penalty legalized over-charges to any amount, and took away the right of forfeiture for them, would involve this absurdity: that the Companies might charge five hundred dollars more than the legal tolls or fares, and could be compelled to pay only one hundred by way of penalty, and by such payment escape all other liability.

The law imposing this penalty is not a law relating specially to these Companies. It is a *general* law, passed the 13th of March, 1839, inflicting a penalty of $100 on any incorporated company in the State having by law a right to take toll, which shall charge more than the lawful tolls or fares. It gives an additional remedy *to the individuals who have been over-charged*, to recover penal damages for the private injury done to them by extortionate exactions. It has nothing to do with the duties of the companies *to the State*. Previously to the law imposing that penalty, an individual, paying more than the legal fares or tolls, might have recovered back the excess by a common law action, or, if he had tendered the legal rates, and the companies had refused to carry, he might, in an action on the case, have recovered liberal damages. This act of 1839, gave to all persons defrauded, in respect to over-charges by any railway or canal company in the State, a right to recover a fixed sum, by way at once of compensatory and exemplary damages. It is a private remedy of the plundered party: an affair not between the State and the Company, but between that plundered party and the Company: a remedy cumulative upon the remedies which he had before, and altogether collateral to the rights and remedies of the State. The *abuse* of the franchise granted by the State, remains, whether private persons choose to enforce their remedies or not: and, by the fundamental law of the incorporation, that abuse is legal cause of the forfeiture of the charter.

That the system of exacting a charge of four dollars for years, in the face of an express provision that it should not be lawful for them to charge more than three dollars, is abundant ground for a forfeiture of both the Companies' charters, by *quo warranto*, or information, is therefore certain. And why is not this done? Where lies the fault of the grievous oppression to which the community is subjected by these modern Scirons? Not with the Legislature. So far as making laws to restrain the companies can extend, the Legislature has always done its duty. If it were to assemble to-morrow for the specific purpose of passing an enactment to prevent the companies from charging more than three dollars, they might do it with more words, but they could not do it more clearly, more positively, more comprehensively than they have already done. Not with the judiciary. In the case of the Company *v.* Briggs, the Supreme Court has expressly decided that the companies in the use of the Trenton and Brunswick road, are subject to the restriction in the act of the 15th February, 1831. The responsibility for the public oppression of which all the country complains, *is with the Attorney-General.* It is his duty to institute proceedings to resume the misused franchises which have been granted to these companies. This is the proper mode of proceeding; not by legislative severity, but by regular course of justice. Let not the companies have it in their power to say that they have been destroyed by popular prejudice, or political violence. Let them be taken before the ordinary tribunals of judicial investigation. Let the decisions of legal right determine their fate. They have lived against law; let them perish by the law.

NO. III.

Burlington, May 4, 1849.

It has already been shown, *in the first place*, that the law giving the Camden and Amboy Company a monopoly of the Railroad communication between the cities, is not a part of the company's charter, and not a "contract," in that sense in which the Constitution inhibits a State from impairing the obligation of contracts; and *in the second place*, that the charters of the companies, with all their rights and privileges, are forfeit in law, and may at any time be vacated and annulled by *quo warranto* or information, on account of illegal charges for the transportation of passengers and merchandise. It will now be shown, *in the third place*, that, supposing the law which gave the companies a monopoly, to be a part of their charter, and inviolable as a constitutional contract, this *chartered monopoly*, being a legal franchise, is private property, and as such is subject to be taken for public uses, as all other private property is, upon reasonable compensation being made.—This supreme prerogative of the State Government, is sometimes known as *the right of eminent domain.* Its existence as a clear, practical right, and its application to a road company enjoying a monopoly by charter, have recently been established by the decision of the Supreme Court of the United States. The case alluded to is, The West River Bridge Company *v.* Dix et al., 6 Howard 507, decided at the January term, 1848. The facts are as follows:

In 1795, the Legislature of Vermont passed an act incorporating the "West River Bridge Company" for one hundred years, and vesting in that company *the exclusive privilege* of erecting and continuing a bridge over West River within four miles of its mouth; and in accordance with this act, the bridge was built in 1795, 1796 and 1797. In 1833, the Legislature passed an act "Relating to Highways," which provided that whenever a new highway should be needed, the courts "shall have the same power to take any real estate, easement, or franchise of any turnpike, or other corporation, when, in their judgment, the public good requires a public highway, which the courts now have, by the laws of this State, to lay out highways over individual or private property; and the same power is granted, and the same rules shall be observed, in making compensation to all such corporations and persons, whose estate, easement, franchise, or rights shall be taken, as are now granted and provided in other cases." In 1842, a petition was presented to the County Court, asking for the laying out of a new highway across the West River. "Your petitioners further represent," says this document, "that the toll-bridge across West River, owned by the West River Bridge Corporation, is, and for a long time has been a sore grievance, both to the traveller and the inhabitants of the towns in the vicinity, who have occasion to pass and repass, travel and labour on said highway; and however the legislature in the infancy of the State may have exercised a sound discretion in granting said toll-bridge, yet, in the present improved and thriving condition of the inhabitants, your petitioners are unable to discover any good reason why said grievance should longer be endured, or why the wealthy town of Brattleboro' should not, as well as other towns, much less able, sustain a free bridge across West River." The petitioners, therefore, prayed the court "to take the real estate, easement or franchise of the 'West River Bridge Company,' a corporation owning the aforesaid toll-bridge, for the purpose of making a free road and bridge across said river, agreeable to the statute," &c. Commissioners were accordingly appointed, who reported that they "were unanimously of opinion, that public good required that the real estate, easement, or franchise of the West River Bridge Corporation should be taken, and compensation made thereof, that said toll-bridge might

thereafter become a free bridge." They also assessed the value of the real estate, and easement or franchise of the company at four thousand dollars. These proceedings were confirmed, and the bridge opened for free public travel. A certiorari was taken to the Supreme Court, where the case was argued on the constitutionality of the statute, and the decision of the court below was confirmed. —This Writ of Error was then brought to the Supreme Court of the United States; and was argued by Mr. Webster and Mr. Collamer against the constitutionality, and by Mr. Phelps in favour of it, and decided by all the Judges, excepting Wayne J., who dissented, in favour of the validity of the statute. The opinion of the court was delivered by Mr. Justice Daniel.

He said, that the charter of incorporation was undoubtedly a contract which, under the constitution, the Legislature of Vermont could not impair; but that the "power, denominated the *eminent domain* of the State, is, as its name imports, paramount to all private rights vested under the government, and these last are, by necessary implication, held in subordination to this power, and must yield in every instance to its proper exercise." "The instances of the exertion of this power, in some mode or other," he continued, "from the very foundation of civil government, have been so numerous and familiar, that it seems somewhat strange, at this day, to raise a doubt or question concerning it. In fact, the whole policy of the country, relative to roads, mills, bridges and canals, rests upon this single power, under which lands have been always condemned; and without the exertion of this power, not one of the improvements just mentioned, could be constructed. In our country, it is believed that the power was never, or at any rate, rarely, questioned, until the opinion seems to have obtained, that the right of property in a chartered corporation was more sacred and intangible than the same right could possibly be in the person of the citizen; an opinion which must be without any grounds to rest upon, until it can be demonstrated either that the ideal creature is more than a person, or the corporeal being is less.—For, as a question of the power to appropriate to public uses the property of private persons, resting upon the ordinary foundations of private right, there would seem to be room neither for doubt nor difficulty. A distinction has been attempted, in argument, between the power of a government to appropriate for public uses property which is corporeal, or may be said to be in being, and the like power in the government to resume or extinguish a franchise. The distinction thus attempted, we regard as a refinement which has no foundation in reason, and one that, in truth, avoids the true legal or constitutional question in these cases; namely, that of the right in private persons, in the use and enjoyment of their private property, to control and actually to prohibit the power and duty of the government to advance and protect the general good. We are aware of nothing peculiar to a franchise which can class it higher, or render it more sacred, than other property. A franchise is property, and nothing more. A franchise, therefore, to erect a bridge, to construct a road, to keep a ferry, and to collect tolls upon them, granted by the authority of the State, we regard as occupying the same position with respect to the paramount power and duty of the State to promote and protect the public good, as does the right of the citizen to the possession and enjoyment of his land under his patent or contract with the State, and it can no more interpose any obstruction in the way of their just exertion. Such exertion we hold to be not within the inhibition of the Constitution, and no violation of a contract. The power of a State, in the exercise of eminent domain, to extinguish immediately a franchise it had granted, appears never to have been directly brought here for adjudication, and consequently has not been heretofore formally propounded from this court; but in England, this power, to the fullest extent, was recognized in the case of the Governor and Company of the Cast Plate Manufacturers *v.* Meredith, 4 Term 794, and Lord Kenyon, especially in that case, founded solely

upon this power the entire policy and authority of all the road and canal laws of the kingdom." Separate opinions to the same effect, but going more fully and elaborately into the doctrine, were delivered by Justices M'Lean and Woodbury. —Mr. Justice Wayne, alone, dissented.

This decision is the death blow of the Camden and Amboy Railroad Companies. The soundness of the principle cannot now practically be discussed. It is the settled and unquestionable Supreme Law of the land. The Legislature of New Jersey may, at its next session, establish new regulations in regard to the use of the roads, and authorize individuals, or create new corporations, to use the road upon those terms. Or it may vest the control of the roads in a new public corporation, the regulations of which will effectually secure the interests of the community. Reasonable compensation, however, is to be made. But what is to be the measure of that compensation? The *road* is, by the 28th section of the charter of 1830, "declared to be a *public highway*, subject to the regulations of the said company, as contained in the seventh section." The *franchise* conferred by the seventh section, of regulating the terms on which the road shall be used, and of demanding tolls, is the only property of the company which is to be taken for public purposes. The *road*, being already a public highway, no compensation is to be made for it. The only loss to be sustained by the company will consist in the extinguishment of the franchise created by section seventh, and for that only is compensation to be made.

In estimating the value of a franchise, for purposes of compensation, the liability of that franchise to immediate forfeiture under a *quo warranto*, must of course be taken into account. The principle recently laid down by Mr. Webster, in the Senate, comes into application. He declared it to be a settled principle of law, that if the public authorities, in time of war, destroy private property which was morally certain to fall into the hands of the enemy, no compensation is to be made; because the property had to the owner no practicable, marketable value, since he was certain to lose it in another direction. What is the value of an estate upon condition, after a right of entry has accrued to the grantor for breach of condition? Just nothing at all. If the company have incurred a liability to forfeiture of their franchises, it is morally certain that the forfeiture will speedily be enforced. That the most odious corporation in the Union will continue to have an existence in fact, after its right of existence is demonstrably gone, is a probability not worth one straw. If, therefore, in the judgment of the tribunal which assesses the damages, all the company's franchises are now forfeitable for excessive tolls taken by the company, or other malfeasance, those franchises are now worthless, and no damages, or merely nominal damages, are to be given for them.

This series of papers on the legal aspect of the present Railroad controversy is now concluded. Their object has not been to discuss the merits of that dispute; but only to remove the delusion and falsehood which have been propagated in regard to the constitutional unassailability of these companies. Whether the people of New Jersey shall desire to abolish the monopoly, is for them alone to determine: but when they shall desire it, there is certainly no legal difficulty whatever in the way.